

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 56066-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
STEVEN M. BAILEY,)	Unpublished Opinion
)	
Appellant.)	FILED: July 31, 2006
)	

PER CURIAM. Steven Bailey appeals his sentence for multiple counts of child molestation in the third degree, rape of a child in the third degree, and attempted child molestation in the third degree. Bailey argues that the prosecutor breached the plea agreement by undermining the recommended sentence. Because we conclude that the prosecutor objectively contradicted the recommended sentence, we reverse and remand for a new sentencing hearing in front of a different judge.

FACTS

Steven Bailey pleaded guilty to two counts of child molestation in the third degree, three counts of rape of a child in the third degree, and one count of attempted

child molestation in the third degree. Bailey's plea agreement required the prosecutor to recommend a Special Sexual Offender Sentencing Alternative (SSOSA) contingent on "receipt of a sexual deviancy treatment evaluation and treatment plan each acceptable to the State from a sexual deviancy therapist acceptable to the State[.]"

The provision included the following qualification in handwritten script: "The defendant may have one evaluation only with Norman Glassman. Unless the provider determines that the [defendant] is a good candidate, the State will not recommend a SSOSA. If the provider determines he is a good candidate a SSOSA recommendation will be made." (emphasis in the original).

At the first sentencing hearing, the prosecutor claimed that she should not be bound to the plea agreement because Glassman's evaluation was not acceptable to the State. The prosecutor argued that Glassman's conclusion that Bailey was a good candidate for the SSOSA was not supported by Glassman's own evaluation of Bailey. The court concluded that by not recommending the SSOSA, the State would be in breach of its plea agreement. The court provided Bailey the choice to withdraw his guilty plea or to have the court enforce specific performance of the plea agreement. Bailey chose specific performance, and the case was transferred to a new judge.

In the second sentencing, the prosecutor began her discussion of the SSOSA by raising concerns regarding Glassman's evaluation of Bailey: "This Court probably had the same concerns, having yourself, Your Honor, done thousands of these sentencings, that I did with the evaluation." Verbatim Report of Proceedings (VRP) (Mar. 14, 2005) at 6. The prosecutor proceeded to outline the concerns under the guise of addressing them, but actually

succeeded in emphasizing them. In particular, the prosecutor described her concern that during the evaluation, Bailey did not fully admit his deviancy, he denied using alcohol to facilitate sexual contact with his victims, and he denied having alcohol problems in the past. The prosecutor also indicated concern that Bailey might not be able to comply with rules or be amenable to polygraph monitoring, which she argued are two necessary characteristics to succeed in the SSOSA program. To illustrate her concerns, the prosecutor described Bailey's breach of the court order not to contact his daughter and the fact that Bailey had several inconclusive results from his polygraph analysis. While describing these concerns, the prosecutor stated that Glassman was confident that Bailey could overcome such barriers.

For those reasons, Judge, because Mr. Glassman is confident that Mr. Bailey is a good candidate for a SSOSA. The State is bound by its recommendation, and that's what it's recommending. I'm deferring to the expert in this case, Mr. Glassman. I bring those things up not to suggest that this Court should not follow the SSOSA recommendation. I'm not undermining my recommendation. I'm anticipating what questions the Court might have about why I'm taking this position in light of those what seem to be glaring inconsistencies in the report.

VRP (Mar. 14, 2005) at 9. During the course of her presentation, however, the prosecutor expressed lack of confidence in Glassman as a treatment provider. The prosecutor asked the court not to appoint Glassman to be the treatment provider. Later, she claimed that Glassman had expressed "his own . . . inability to monitor compliance because he cannot trust the polygraph." VRP (Mar. 14, 2005) at 28.

The court concluded that the SSOSA was not appropriate for Bailey and ordered a standard-range sentence. In a postjudgment hearing, Bailey moved to vacate the

sentence and obtain a new sentencing hearing, arguing that the prosecutor undermined the plea agreement. The court denied the motion and Bailey now appeals.

ANALYSIS

Bailey argues that in spite of facially recommending SSOSA, the prosecutor undermined the plea agreement to recommend the SSOSA. In particular, Bailey refers to a litany of concerns that the prosecutor expressed about Bailey's evaluation, in apparent contradiction to the recommended SSOSA. Additionally, the prosecutor made disparaging comments about the evaluator, Glassman, which conflict with her willingness to defer to his judgment. Finally, Bailey asserts that having a fellow employee of the prosecutor's office argue against the SSOSA as a victims' representative undermines the prosecutor's recommendation.

A plea agreement is a contract between the defendant and the prosecutor. State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998). Because the defendant relinquishes important constitutional rights by complying with a plea bargain, "[d]ue process requires the prosecutor to adhere to the terms of the agreement." State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Under this requirement, a prosecutor need not make an agreed sentencing recommendation enthusiastically. Talley, 134 Wn.2d at 183. The prosecutor is entitled to present relevant facts that might not fully support the recommended sentence. See State v. Gutierrez, 58 Wn. App. 70, 76, 791 P.2d 275 (1990). The prosecutor may not, however, "undercut the plea bargain 'explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.'" State v. Jerde, 93 Wn.

App. 774, 780, 970 P.2d 781 (1999) (quoting Sledge, 133 Wn.2d at 840). The test is whether the prosecutor objectively contradicted the recommendation by use of words or conduct. Jerde, 93 Wn. App. at 780. For instance, a prosecutor's expression of having "second thoughts" while submitting a bargained-for recommendation sufficiently tainted the sentence as to constitute a breach of the plea agreement. In re Palodichuk, 22 Wn. App. 107, 108, 110, 589 P.2d 269 (1978).

Here, the record demonstrates that the prosecutor did not support the SSOSA recommendation, regardless of her language to the contrary. Without prompting or questioning from the court, the prosecutor volunteered numerous concerns about Bailey's sexual deviancy evaluation, including his pattern of lying, his use of alcohol, his inability to follow rules, and his inability to produce trustworthy polygraph results.

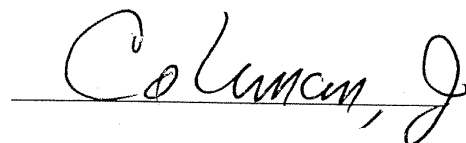
We are not persuaded that the prosecutor expressed these concerns as an attempt to explain why the concerns did not mandate the court's rejection of the SSOSA recommendation. The prosecutor referred to Glassman's opinions to explain why she maintained the SSOSA recommendation in spite of her stated concerns. But on multiple occasions, the prosecutor conveyed her mistrust of Glassman's competency to the court, in direct contradiction with her deference to Glassman's judgment of the appropriateness of SSOSA. First, the prosecutor asked that Glassman not be the treatment provider if the SSOSA was granted. Later, the prosecutor explained that Glassman was unable to monitor Bailey's compliance using the polygraph. Such disparaging treatment of Glassman directly undermines the major rationale for maintaining the SSOSA recommendation and constitutes a breach of the plea bargain. Viewed objectively, the prosecutor's

emphasis on Bailey's shortcomings as a SSOSA candidate and her contradictory treatment of Glassman's opinions demonstrate not a mere lack of enthusiasm, but an attempt to circumvent the recommendation.

We note that the fact that a victim advocate employed by the prosecutor's office testified against the prosecutor's recommended SSOSA sentence does not contribute to the breach of the plea agreement. Notwithstanding State v. Sanchez, 146 Wn.2d 339, 356, 46 P.3d 774 (2002) (holding an investigating officer was bound to a prosecutor's plea agreement based on basic principles of fairness and agency), the victim advocate is not prohibited from testifying contrary to the prosecutor's recommendation. The witness made clear to the court that she was testifying solely as a representative of three of Bailey's victims. She conveyed the victim's concerns and opposition to the SSOSA to the court, not her own opinion or that of her employer. Therefore, her request that the court deny the SSOSA was not part of an effort of the prosecutor's office to affect the sentencing procedure, but rather an effort to promulgate victim's rights.

For the foregoing reasons, we reverse and remand for a new sentence hearing in front of a new judge.

FOR THE COURT:

A handwritten signature in cursive script, reading "Columen, J.", written over a horizontal line.

Ajid, J.

Eleenfon, J